IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2004 Session

BETTY EVONE MCLENDON v. JAMES EARL MCLENDON, ET AL.

Appeal from the Chancery Court for Williamson County
No. 26061 R.E. Lee Davies, Chancellor

No. M2003-01941-COA-R3-CV - Filed October 12, 2004

The trial court's judgment grew out of a petition for criminal contempt filed by Jimmy Kenaum ("Kenaum") and Jerry Davis (collectively "the Intervenors"), against James Earl McLendon ("McLendon") for violation of an agreed order ("the agreed order") in a divorce action between McLendon and his now ex-wife, Betty Evone McLendon.[1] The agreed order focused on property ("the Property") which was owned by a corporation, McLendon & Associates. The agreed order provides, among other things, that Kenaum was granted an ingress/egress easement across the Property. The trial court found McLendon in criminal contempt for disparaging the Intervenors to third parties and for placing a locked cable over Kenaum's water line. McLendon appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

James Earl McLendon, appellant, Nashville, Tennessee, Pro Se.

A. Scott Yarbrough, Nashville, Tennessee, and Elliott Ozment, Nashville, Tennessee, attorneys for appellees, Jimmy Kenaum and Jerry Davis.

OPINION

I.

The Intervenors, McLendon, and his former wife, were equal shareholders in McLendon & Associates, whose sole asset was the Property, which is located in Williamson County. Since the McLendons' interest in McLendon & Associates was a part of their marital estate, the trial court granted the Intervenors leave to intervene in the divorce suit for the purpose of asserting their

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[1] Ms. McLendon was not a party to the contempt proceedings below.

position relative to the Property. On April 24, 2002, the agreed order was entered in the divorce case providing for the sale of the Property. The agreed order provides that it is intended to resolve "all issues and controversies regarding the Intervenors [sic] portion of [the divorce litigation]" and to resolve "[a]ll claims related to McLendon [&] Associates, Inc." As pertinent to the issues before us, the agreed order provides as follows:

> The parties agree that they shall not disparage each other individually or as a group in any way from the date of execution of the Order;
>
> * * *
>
> The parties agree to grant [Kenaum] an ingress/egress easement across the McLendon and Associates, Inc. property through Mayfield Road and the previously constructed road to his residence; . . .

(Numbering in original omitted). Following the entry of the agreed order, the trial court, on December 20, 2002, entered another order, directing the sale of the Property to Julian C. Cornett ("Cornett"). Kenaum was ordered to execute the deed on behalf of McLendon & Associates. The proceeds from the sale were to be distributed by the closing attorney. Any disputes relative to the ingress/egress easement were ordered "placed on the docket for further hearing on a non-domestic date, if necessary."

On March 5, 2003, the Intervenors filed a motion seeking to set aside the agreed order or, in the alternative, asking for a finding of civil contempt against McLendon. In support of their motion, the Intervenors contended that McLendon had "continuously carried out a course of conduct intended to subvert [the court's order]." They relied upon the fact that McLendon had physically attacked Kenaum, harassed the Intervenors and their guests on the Property, and embarked upon a campaign to disparage the Intervenors. They also alleged that McLendon violated the agreed order by placing a locked gate across Kenaum's easement. McLendon responded with a motion seeking to set aside the order decreeing the sale of the Property to Cornett or, alternatively, requesting that the Intervenors be held in civil contempt. McLendon based his petition for contempt on allegations that the Intervenors had failed to honor certain obligations in the agreed order, such as the construction of certain roads, and that Kenaum had made derogatory comments about McLendon.

The trial court considered the competing motions on April 9, 2003. McLendon represented himself.[2] Kenaum testified at the hearing that McLendon physically assaulted him; that McLendon made disparaging remarks about the Intervenors to third parties, namely in a letter written to Cornett,

[2] McLendon's former attorney withdrew on March 13, 2003.

the purchaser of the Property[3]; and that McLendon placed a locked gate across Kenaum's easement, which barred access to utility lines and precluded emergency vehicles from reaching his property. After hearing testimony from both parties, the court determined that the alleged assault was a matter that should be pursued in a separate tort or criminal action; that McLendon had disparaged Kenaum to third parties; and that the gate erected by McLendon violated the agreed order, thereby rendering McLendon in willful contempt of court. Consequently, the court ordered McLendon to remove the lock on the gate within 24 hours and remove the gate within 30 days. The court said failure to do so would result in immediate incarceration. The court also found McLendon in contempt of the agreed order based upon his disparaging comments about the Intervenors.

Following the April 9, 2003, hearing, Attorney Scott A. Yarbrough, counsel for the Intervenors, drafted an order, which was ostensibly based upon the court's rulings from the bench. Although a certificate of service was affixed to the draft order indicating it was sent to McLendon, McLendon testified that he never received it. The court signed and entered this order on April 15, 2003.

The parties appeared before the court again on June 17, 2003, to argue several motions. The motions that are relevant to this appeal include the Intervenors' petition for criminal contempt, filed on May 16, 2003, and McLendon's petition for sanctions against Attorney Yarbrough, filed on June 16, 2003. The Intervenors' petition was based, in part, on allegations that McLendon failed to remove fencing from the easement, and continued to disparage the Intervenors in violation of the court's orders. Testimony revealed that McLendon had complied with the civil contempt order by removing the lock and the gate, but had placed a locked cable spanning the water line blocking Kenaum's access to it. Kenaum also testified that McLendon continued to disparage the Intervenors to third parties and, in fact, made comments to the Bank of Nashville which prompted the bank to place a hold on the account in which the proceeds from the sale of the Property had been deposited.[4] The court determined that McLendon was in criminal contempt of court for placing a locked cable over the water line, thereby violating the spirit of the agreed order and the civil contempt order, and for disparaging the Intervenors in a manner which resulted in a hold being placed on the bank account.

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[3] McLendon's letter to Cornett, dated January 30, 2003, reads, in relevant part:

> You might think that I am angry due to being ripped off by Mr. Kenaum and Mr. Davis for about $70,000 including legal fees and the property sold for much less than market value. Then you would be right. I hope that your continued business relationship with these individuals does causes [sic] you to make a profit, even at someone else's expense. I suspect that you may find yourself with the same fate that I have already experienced in being in business with [the Intervenors].

[4] McLendon had previously attempted to file an incorrect easement with the Register of Deeds in an attempt to limit the easement rights of the subsequent purchaser. Kenaum attempted to challenge McLendon's failure to remove the purported easement from the Register of Deeds. However, since the court found the issue was part of McLendon's motion to alter or amend the judgment also heard on this date, he was not in contempt when the issue was still before the court.

The court also heard testimony on McLendon's petition for sanctions against Attorney Yarbrough pursuant to Tenn. R. Civ. P. 11.02. McLendon alleged that Yarbrough drafted an order following the April 9, 2003, civil contempt hearing that included a provision requiring him to disassemble and remove "any gates and fencing encroaching upon the [easements]," when, in fact, as the trial court later found, McLendon had only been ordered to unlock and remove the gate directly impacting Kenaum's use of the easement. The court found no evidence of willful misconduct on Yarbrough's part and declined to levy sanctions against him.

The court found McLendon to be in criminal contempt, ordered him incarcerated for four days, and set his bail bond at $15,000. McLendon appeals and claims that the trial court committed a myriad of errors when it found him in contempt and when it dismissed McLendon's Rule 11 petition against Yarbrough. He also raises issues regarding the trial court's conduct at trial.

II.

In a case involving a finding of criminal contempt, a court's judgment will not be set aside unless the evidence is insufficient to support the trier of fact's findings beyond a reasonable doubt. Tenn. R. App. P. 13(e). Since one convicted of criminal contempt loses his or her presumption of innocence, on appeal it is incumbent upon the appellant to overcome a presumption of guilt. ***Thigpen v. Thigpen***, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993). Upon review, this court does not review the evidence presented in the light most favorable to the accused, and will only reverse the trial court's judgment where the evidence is lacking. ***Id.***

McLendon cites several errors relative to the criminal contempt judgment. He argues that the trial court failed to grant him his rights; that the court erred in refusing to grant him a jury trial; that the evidence does not support a finding of contempt, particularly in view of the fact that the court relied upon inadmissible hearsay; and that the court violated the statutory prescriptions for criminal contempt by adding a $15,000 cash bond to his punishment. We address each contention in turn.

III.

A.

McLendon's first set of alleged errors concern the manner in which the trial court conducted the criminal contempt hearing, in particular the court's failure to recognize or advise McLendon of his rights. The rights afforded to one accused of criminal contempt include the following as set forth in Tenn. R. Crim. P. 42:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. . . .

Tenn. R. Crim. P. 42(b). A defendant charged with criminal contempt is also entitled to constitutional protections as if he were under indictment, including a presumption of innocence, the right to require proof beyond a reasonable doubt, the right against self-incrimination, and the chance to testify and call witnesses on his or her behalf. ***Fortson v. Fortson***, C/A No. 03A01-9611-CV-00363, 1997 WL 529001, at * 2 (Tenn Ct. App. E.S., filed Aug. 28, 1997).

McLendon contends that his right to testify was impaired when the trial court silenced him at the end of the trial. McLendon now contends that, under the Tennessee Constitution, he was entitled to present closing argument and should have been permitted to speak. The provisions of the Tennessee Constitution outlining the rights of a criminal defendant provide as follows:

> That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Tenn. Const. art. I, § 9. McLendon alleges in his brief that the trial court erred in directing him to be quiet, thereby prohibiting him from "ask[ing] questions or present[ing] arguments on conflicting statements that would normally have been allowed of an Attorney."

When Attorney Yarbrough called McLendon as an adverse witness in the contempt proceeding, the trial court advised McLendon of his right against self-incrimination. McLendon asserted this right and declined to testify. During the court's rendition of its opinion from the bench, it refused to permit McLendon to then verbally interject evidence since he had declined to testify. We find that the trial court properly advised McLendon of his rights and did not err by prohibiting him from speaking during the court's oral opinion from the bench. When McLendon asserted his right against self-incrimination, it was proper for the court to deny him an opportunity to "present" evidence by way of oral argument during the time the court was attempting to render its opinion from the bench. The time for submitting evidence had passed and McLendon had previously chosen not to testify, which was his right. The trial court was correct in refusing to allow McLendon to give unverified testimony during the course of the trial court's opinion from the bench.

McLendon also raises an issue relative to his right "to have compulsory process for obtaining witnesses in his favor." Tenn. Const. art. I, § 9. In particular, he faults the trial court for failing to compel the attendance of Betty Denault of the Bank of Nashville, whose statements were testified to by Kenaum. However, McLendon never subpoenaed Denault and, hence, cannot now be heard to complain about the absence of a witness whose presence was not compelled by subpoena.[5]

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[5]McLendon also challenges the court's denial of his motion to alter or amend judgment, in which he requested that he receive the signature card for the bank account in Nashville to demonstrate that his name was left off the account. (continued...)

B.

McLendon also contends that he was entitled to a jury trial, and that he had, in fact, penned "Jury Trial Requested" on his answer to the Intervenors' petition for criminal contempt.[6] In support of his position, McLendon cites Tenn. Code Ann. § 21-1-103 (1994), which provides that a party in chancery is entitled to a jury upon application. However, Tennessee courts have consistently held that the right to a jury trial does not extend to criminal contempt proceedings. ***Ahern v. Ahern***, 15 S.W.3d 73, 82 (Tenn. 2000); ***Pass v. State***, 184 S.W.2d 1, 3 (Tenn. 1944). The power to address these violations is entrusted to the courts, and consequently a defendant is not entitled to a jury. ***Id.*** We therefore find that the trial court did not err in declining to grant McLendon a jury trial on the petition for criminal contempt.

C.

In addition to the alleged procedural errors discussed above, McLendon challenges the sufficiency of evidence to support the court's finding that he was in criminal contempt. In reviewing the sufficiency of the evidence, we review the evidence advanced at trial to determine if the proof before the trial court is sufficient to support a finding of guilt beyond a reasonable doubt. Tenn. R. App. P. 13(e).

The Intervenors alleged that McLendon violated the agreed order in three ways: by disparaging the Intervenors; by installing a cable on one of the roads; and by installing a second cable that crossed Kenaum's water line. At the close of the evidence, the court determined that McLendon's disparaging remarks to third parties constituted the type of conduct prohibited by the order. The court also found that there was reasonable doubt as to whether the cable traversing the road blocked Kenaum's easement, but found the evidence demonstrated beyond a reasonable doubt that the cable stretched across the water line constituted "a violation of the spirit of the [agreed order]."

McLendon challenges the sufficiency of evidence on the court's finding that he disparaged the parties. McLendon contends that the court based its finding on Kenaum's testimony as to what a Bank of Nashville employee, Betty Denault, told Kenaum about what McLendon said that resulted in the hold being placed on the Bank of Nashville account. The court's findings on this point stems from the following testimony at trial:

> YARBROUGH: Tell me a little bit more about your conversation with Betty Denault at the Bank of Nashville downtown.

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[5](...continued)
However, there is no evidence that this document was ever subpoenaed, and it appears to be irrelevant to the matters before this court.

[6]McLendon also argues that his request for a jury trial on his motion to alter or amend was improperly denied. However, a party is not entitled to a jury trial on a motion.

> KENAUM: Betty Denault says that [McLendon] came there and discussed this particular lawsuit to some degree, that there was a pending case or hearing that – to the point that they were concerned why – or some issues as to what he had said about me and about this lawsuit there, to the point that they put a hold on the account.
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> * * *
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> COURT: Did they tell you what he said specifically about you?
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> KENAUM: Not in specific detail of what she said. She said, Jimmy, I was concerned that this man was here talking about you like he was, and I said, well, let me get [Attorney Yarbrough] on the phone, let me get [Betty McLendon] on the phone. And I sat there for over two hours getting this situation straightened out and getting these people their money, which cost me additional time, additional problems that [McLendon] is continuous [sic] to do, and this is ridiculous.

McLendon did not object to this testimony at trial, nor did he question Kenaum about it on cross-examination. However, he now contends on appeal that this was inadmissible hearsay and consequently could not serve as a basis for the court's finding that McLendon disparaged the Intervenors. *See* Tenn. R. Evid. 802.[7]

Generally speaking, when a party fails to object to improper evidence at trial, the admission of that evidence is not subject to review on appeal, as "[n]othing [in the Rules of Appellate Procedure] shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). When a party is proceeding *pro se*, that party should be accorded the same treatment as that given to the represented party. ***Irvin v. City of Clarksville***, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). However, the *pro se* litigant is not excused from complying with the same procedures and substantive law as those applicable to the represented party. ***Id.*** This court has declined to review a party's alleged error on appeal when he or she failed to properly object at the hearing. *See* ***Ray v. Ray***, C/A No. M2003-01158-COA-R3-CV, 2004 WL 1114578, at *20 n. 3 (Tenn Ct. App. W.S., filed May 18, 2004). Consequently, we find no error in the trial court's receipt of this unobjected-to evidence.

McLendon also challenges the court's finding that the cable traversing the water line violated the agreed order. McLendon presents several facts in his brief arguing that the water line was not part of the easement granted to Kenaum in the agreed order, and that Kenaum never paid for the easement. However, our review is confined to the record certified to us by the trial court clerk. At trial, Kenaum testified on direct examination that McLendon installed a cable, approximately 50 feet

[7] Tenn. R. Evid. 802 provides that "[h]earsay is not admissible except as provided by these rules or otherwise by law." Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c).

long, that runs along Kenaum's water line and hinders access to mowing and maintaining the water line. This cable had a lock on it and Kenaum believed it had been there prior to McLendon's erection of gates on the easement.[8] McLendon, on cross-examination, focused the majority of his questions on the disbursement of funds from the sale of the land. The only questions pertaining to the cable across the water line did not address the issue of whether the water line was contemplated by the original agreement creating the easement. We find sufficient evidence beyond a reasonable doubt that McLendon violated the order by placing a locked cable that precluded access to the water line. The transcript of the civil contempt hearing indicates that one of the ways in which Kenaum used this easement was to maintain and repair his water line, which he installed and which is jointly owned by the Intervenors and McLendon. Facts presented in McLendon's brief, which are not shown in the record, cannot be considered by us.

D.

McLendon contends that the trial court violated Tenn. Code Ann. § 29-9-103 (2000), by setting a $15,000 cash bond. The statute limits the punishment that may be imposed by a chancery court to a fine up to $50 and imprisonment not exceeding ten days. However, the statute does not prohibit a trial court from setting a bond. We find no error in the trial court's decision to set a $15,000 cash bond.

IV.

McLendon also seeks review of the trial court's dismissal of his petition for sanctions against Attorney Yarbrough. We review a trial court's decision on a motion seeking Rule 11 sanctions under an abuse of discretion standard, according great weight to the lower court's decision. ***Krug v. Krug***, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992).

[8] Following the hearing on the civil contempt order, McLendon was instructed to remove the locked gates from the easement. McLendon did comply with this order.

Even though McLendon's petition fails to exactly track the language of Tenn. R. Civ. P. 11.02[9], the trial court addressed the merits of his argument, finding that McLendon "did his best to substantially comply" with the requirements of the rule. McLendon first alleged that sanctions were appropriate because the order that Yarbrough prepared following the hearing on April 9, 2003, was incorrectly drafted. He correctly points out that the trial court's order directed McLendon to tear down the fences along the easement while the court had only ordered from the bench that McLendon take down the locked gate blocking the easement. The court found that sanctions were not appropriate, noting that such mistakes frequently happen and may be remedied by a motion to alter or amend. In fact, this is what happened in the instant case as McLendon was successful on his motion to alter or amend.[10] The court found no willful impropriety on the part of Yarbrough.

Second, McLendon alleged that he never received a copy of the draft order which Yarbrough claims to have mailed to him. According to McLendon, all other documents sent by Yarbrough throughout the pendency of these proceedings were sent by way of certified mail; the order, however, was sent first class mail. The court noted that it could not mandate that correspondence be sent by way of certified mail. The court also noted that any injury from McLendon's failure to receive the draft order was remedied by his filing a motion to alter or amend, on which he prevailed. We find no abuse of discretion on the part of the trial court in declining to levy sanctions against Yarbrough.

V.

McLendon contends that the trial court's conduct was such as to warrant action by this court. He alleges that the court made disparaging remarks throughout the proceedings in violation of Tenn. Code Ann. § 17-5-302 (1994) (Supp. 2003), which code section enumerates the type of conduct for which a judge may be disciplined. In particular, McLendon contends that the trial court disparaged him, prohibited him from correcting erroneous statements, and interjected his own opinions during

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[9] Tenn. R. Civ. P. 11.02 reads, in pertinent part, as follows:

> By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

[10] In ruling on McLendon's motion to amend, the court granted it to the extent that the order should delete the requirement that he remove the fences along his property.

the proceedings.[11] Judges are not subject to discipline for the "appropriate exercise of judicial discretion," and consequently, "[n]ecessary judicial independence requires that a judge not be subject to discipline for good faith comments directed primarily and principally at issues properly before the court." ***In re Brown***, 879 S.W.2d 801, 806 (Tenn. 1994). We find that the judge did not engage in any conduct warranting reversal or other relief.[12]

VI.

McLendon seeks numerous forms of injunctive and monetary relief, including the expense of transcripts and court reporters' fees. He also requests that this court reverse the trial court's award of attorney fees to Intervenors and return to him his $1,000 cash bond. Additionally, McLendon asks this court to turn relevant court documents over to the Office for Professional Responsibility and the Court of Judiciary so that they may review and impose necessary sanctions against Attorney Yarbrough and Chancellor Davies, respectively. We find no basis for granting any of the requested relief.

VII.

The judgment of the trial court is affirmed and this matter is remanded to the trial court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law.[13] Costs on appeal are taxed against James Earl McLendon.

CHARLES D. SUSANO, JR., JUDGE

[11]The testimony regarding which McLendon charges that the trial court interjected its opinion reads, in relevant part, as follows:

> YARBROUGH: ...there are other types of gates that don't require locks and fences and gates. You see them in the country all the time.
>
> COURT: Sure, cattle gaps.

[12]McLendon levies several accusations at Yarbrough and Chancellor Davies in his reply brief. The factual predicate for those charges as set forth in McLendon's brief are not a part of the record certified to us by the trial court clerk. Hence, we will not consider them.

[13]While this matter was pending before us, the appellees filed a motion seeking to strike certain portions of the appellant's reply brief. To the extent that motion addresses matters not in evidence, it is granted. In resolving this appeal, the court has only considered such evidence as appears in the record transmitted to us by the trial court clerk.